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IN THE

Supreme Court of the United States

October Term, 1953

No. 295

Estate of ARTHUR S. DWIGHT, Deceased, BARBARA CHAPIN HAMBY and JOSEPH C. BENSON, Executors,
Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION AND BRIEF ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN C. CRAWLEY,
Attorney for Petitioners.

DANA R. KOONS,
of Counsel.

SUBJECT INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI

Summary Statement 1

Jurisdiction 4

Questions Presented 4

Reasons Relied on for Allowance of the Writ 5

BRIEF IN SUPPORT OF PETITION FOR WRIT

Opinions Below 7

Jurisdiction 7

Statement 8

Specification of Errors 8

Argument 9

The decision below is erroneous and contrary to controlling New York decisions 9

The principle of *Helvering* v. *Mercantile-Commerce Bank & Trust Co.* is inapplicable 11

The Court of Appeals erred in holding that extrinsic evidence was inadmissible to show decedent's motives in establishing the second trust 13

Conclusion 16

APPENDIX A—Tax Statutes 17

Table of Cases Cited

PAGE

American Crystal Sugar Co. v. Nicholas, 124 F. 2d 477.. 15

Arthur R. Jones Syndicate v. Commissioner, 23 F. 2d 833 15

Commissioner v. H. F. Neighbors Realty Co., 81 F. 2d 173 15

Commissioner v. Porter, 148 F. 2d 566 10

Donnelly, Estate of, 38 B. T. A. 1234 12

Garlock v. Garlock, 279 N. Y. 337 10

Helvering v. Mercantile-Commerce Bank & Trust Co., 111 F. 2d 224; cert. denied 310 U. S. 654.....3, 5, 8, 11, 12

Juillard v. Chaffee, 92 N. Y. 529 16

Lynch, Matter of, 151 Misc. 549 10

Ramsden v. Ramsden, 91 N. Y. 281 11

Scofield v. Grier, 185 F. 2d 551 15

Weintraub v. Weintraub, 302 N. Y. 104 11

Wilkening, Matter of, 137 Misc. 451 10

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COMMISSIONER OF INTERNAL REVENUE,
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—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

May it please the Court:

Barbara Chapin Hamby and Joseph C. Benson, Executors of the Estate of Arthur S. Dwight, deceased, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 3, 1953, reversing a decision of the Tax Court of the United States in favor of petitioners (R. 34-41).

Summary Statement

This proceeding was brought by petitioners for a redetermination of a Federal estate tax deficiency determined by the Commissioner on the estate of Arthur S. Dwight, who died on April 1, 1946, a resident of New York.

As set forth in the opinion (R. 34), the decedent married Anne Howard Chapin on March 15, 1930. She then had

six children by a previous marriage, all of whom were adults except one, who became of age prior to decedent's death. Subsequent to such marriage, decedent established two irrevocable trusts, with a New York bank as trustee, which were still in existence at the date of his death.

The first trust, made on December 21, 1931, in the amount of $170,000 and later increased by $25,000, was to continue during the joint lives of decedent and his wife and the entire net income was to be distributed by the trustee to and among decedent's wife and her six children "for their support and maintenance, without power of anticipation" in the proportions of 40 per cent to the wife and 10 per cent to each of her six children. The trust provided that the trustee should not be responsible for the use or application of such income. Upon the death of the survivor of decedent and his wife, the trust principal was to be distributed to her children or their issue.

The second trust, made on August 15, 1935, in the amount of $200,000 was to continue during the life of the wife only and the entire net income paid over to her by the trustee "for her support and maintenance, without power of anticipation". Upon the death of the wife, the trust principal was to be distributed to her children and two cousins of decedent, or their issue (R. 9-10).

In connection with the second trust, the decedent also wrote a letter addressed to his attorneys (R. 31) which was dated prior to, although not delivered until shortly after, the execution of the trust indenture. Decedent's expressed purpose in so doing (R. 33), was to show that his motives in establishing the second trust were to provide his wife with income to meet the living and hospital expenses of her two adult invalid daughters and also to meet the maintenance expenses of a winter home in Florida which he had theretofore given her. Decedent's wife testified substantially to the same effect (R. 24-25).

At all times during the marriage, decedent and his wife lived together as husband and wife at their principal residence in Great Neck, New York, except for winters which were spent at the Florida home. The decedent paid all the expenses of running the home in Great Neck. After the establishment of the first trust in 1931, the wife paid for her clothing and personal needs.

The Commissioner originally contended that the entire corpus of both trusts was includible in the decedent's gross estate, as being in discharge of a legal obligation, because in each of the indentures it was provided that the net income be paid to the beneficiaries "for their support and maintenance". After the decision by the Tax Court overruling his contention, the Commissioner conceded on appeal that the law of New York imposed no legal obligation upon decedent to support his surviving stepchildren, all of whom were adults at the time of his death. Accordingly, the issue on appeal was limited to 40 per cent of the corpus of the first trust and the entire corpus of the second trust, from which the net income was payable to the wife.

In reversing the Tax Court's decision, the Court of Appeals held that under Section 811 (c) (1) (B) of the Internal Revenue Code, 40 per cent of the value of the first trust and the entire value of the second trust were includible in the decedent's gross estate. The Court of Appeals took the view that the provision for payment of 40 per cent of the income of the first trust to decedent's wife for her "support and maintenance", must be construed as a discharge by decedent, in part at least, of his legal obligation to support her and that even though the trust contained no provision for supervision of the wife's expenditures, as in *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. 2d 224; cert. denied 310 U. S. 654, the existence of the trust income would have been a *pro tanto* defense by the husband in any suit for support brought by his wife

and he therefore retained the enjoyment of that income, since it was to be applied toward the discharge of his legal obligation.

The Court of Appeals reached the same conclusion as to the second trust, after holding in effect that the decedent's letter of intention which had been admitted in evidence by the Tax Court over the Commissioner's objection, was incompetent, because the Court of Appeals reasoned that if the wife had sued for support, the parole evidence rule would have prevented her from showing that the income from the second trust was not to be used for her support and maintenance and the existence of that trust would also have been a *pro tanto* defense to the husband.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254, Title 28 and Section 1141 (a), Title 26 of the United States Code.

Questions Presented

The primary question in this case is whether 40 per cent of the corpus of the first trust and all of the corpus of the second trust above referred to should be included in the gross estate of the deceased grantor, for purposes of the Federal estate tax under Section 811 (c) (1) (B) of the Internal Revenue Code (Appendix A, *infra*).

A further question is whether extrinsic evidence offered by the petitioners and received by the Tax Court was admissible, as against the Commissioner, to show that in establishing the second trust, the deceased settlor did not intend to restrict his wife in any way to the use of the income for her support and maintenance.

Reasons Relied On For the Allowance of the Writ

1. The decision of the Second Circuit Court of Appeals in applying the provisions of Section 811 (c) (1) (B) of the Internal Revenue Code to the trusts in this case, on the facts, goes considerably beyond the scope of the decision of the Eighth Circuit Court in *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. 2d 224; cert. denied 310 U. S. 654. The question of taxation involved is of importance to taxpayers generally in the field of estate tax. It has not been, but should be, settled by this Court.

2. In determining the questions as to the legal interests or rights which were created by the two trust indentures in this case, the Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions.

WHEREFORE, your petitioners pray that the writ be granted.

Dated, August 27, 1953.

JOHN C. CRAWLEY,
Attorney for Petitioners.

DANA R. KOONS,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1953

No.

Estate of ARTHUR S. DWIGHT, Deceased, BARBARA CHAPIN HAMBY and JOSEPH C. BENSON, Executors,
Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals (R. 34-41) is not yet reported.

The opinions of the Tax Court (R. 3-18) are reported in 13 TC 1317.

Jurisdiction

The opinion of the Court of Appeals is dated June 3, 1953 and judgment was entered on the same day (R. 41).

As stated in the preceding petition, jurisdiction of this Court is invoked under Section 1254, Title 28 and Section 1141 (a), Title 26 of the United States Code.

The case involves Federal estate taxes and was brought to the Court of Appeals by petition for review, filed by the Commissioner of Internal Revenue.

Statement of the Case

This has already been set forth in the preceding petition.

Specification of Errors

1. The Court of Appeals erred in finding and holding that 40 per cent of the corpus of the first trust and the entire corpus of the second trust created by the decedent were includible in his gross estate for purpose of the Federal estate tax under Section 811(c)(1)(B) of the Internal Revenue Code, because of the provision in each of the trust indentures that the income was to be paid to decedent's wife for her "support and maintenance".

2. The Court of Appeals erred in finding and holding that *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 8 Cir., 111 F. 2d 224; cert. denied 310 U. S. 654, is not distinguishable on the ground that there the settlor reserved an "enforcible right" to have the income applied toward his wife's support in the trust instrument.

3. The Court of Appeals erred in finding and holding that under the law of New York, the decedent having furnished his wife with such trust income, he had in part at least discharged his legal obligation of supporting her and that the existence of the income would have been a *pro tanto* defense in any suit for support brought against decedent by his wife.

4. The Court of Appeals erred in finding and holding that since the trust income was "to be applied toward the discharge of a legal obligation of the decedent", he retained the enjoyment or use of that income.

5. The Court of Appeals erred in finding and holding that the second trust indenture created a legal obligation on the part of the trustee to pay the income to decedent's wife for her "support and maintenance".

6. The Court of Appeals erred in finding and holding that extrinsic evidence offered by petitioners and received by the Tax Court was inadmissible to show that in establishing the second trust the decedent did not intend to restrict his wife in any way to the use of the income for her support and maintenance.

7. The Court of Appeals erred in reversing the decision and judgment of the Tax Court as to 40 per cent of the corpus of the first trust and the entire corpus of the second trust.

ARGUMENT

The decision of the Court below is erroneous and contrary to, in conflict with or a misinterpretation of controlling New York decisions.

In reversing the Tax Court, the Court of Appeals did not find that the decedent had retained any control over the application of the trust income. Nor did it hold that the trusts were taxable because any of such income was actually used by the wife for her support. What the Court of Appeals did hold was that 40 per cent of the first trust and all of the second trust were taxable because the income therefrom was "to be applied" toward the discharge of decedent's legal obligation to support his wife. The Court of Appeals evidently took the view that by furnishing his wife with the trust income, the decedent had in part at least, discharged his legal obligation of supporting her and that the existence of the trust income would have been a *pro tanto* defense in any suit for support brought by the wife.

Decedent retained no control over the application of the trust income; nor was such control vested in the bank trustee. It is not accurate to say, as did the Court of Appeals with regard to the second trust, that the trust indenture created a legal obligation on the part of the trustee to pay the income to the wife for her "support and maintenance". The sole obligation of the trustee was to pay the net income to the wife (*Matter of Wilkening,* 137 Misc., N. Y. 451, 454; see also authorities referred to in footnote 4, Tax Court opinion at R. 16). The moment any income was paid over by the trustee to the wife, it became her vested property, free from any restraint. (*Matter of Lynch,* 151 Misc., N. Y., 549; *Commissioner* v. *Porter,* 148 F. 2d 566).

However, the Court of Appeals reasoned that having furnished his wife with the trust income, the husband had in part at least, discharged his legal obligation of supporting her. To demonstrate the fallacy of that reasoning, let us suppose that owing to some change in the husband's economic circumstances, or for any other reason, the wife had voluntarily turned over to him all of her income from these trusts, as she received it. In that case, it could hardly be asserted that solely by reason of the income payments to the wife, the husband had thereby been discharged to that extent from his obligation to support her, the same as in the case of any ordinary debt. The husband's duty to support does not depend upon any contract with his wife, and in this case, where the parties were living together, there could be no arms-length agreement between them reducing the husband's obligation to its monetary equivalent (*Garlock* v. *Garlock,* 279 N. Y. 337). There the Court said (at p. 341):

> "The husband is obliged to support his wife in accordance with his condition in life as long as they are living together as husband and wife, and contracts made which place any limitations upon the obligation imposed by law are illegal and of no effect."

Furthermore, it is well settled in New York that although a wife may sue her husband to recover moneys actually expended from her separate estate for necessaries, or on a separation agreement, an action for maintenance and support as such, is not maintainable. It is only where an action is brought by the wife for divorce or separation, that an allowance of alimony is proper (*Ramsden* v. *Ramsden*, 91 N. Y. 281). See also *Weintraub* v. *Weintraub*, 302 N. Y. 104, 108, where the New York Court of Appeals said:

> "The wife's right to alimony is not 'a private claim or demand' arising out of the marriage of the parties. That right comes from the statute and not from the common law. * * * *Such a claim in itself furnishes no foundation for a cause of action; it is a mere incident of the judgment in a matrimonial action.* * * * The parties by themselves were without power permanently to fix or to alter their marital status or the scope of the obligations arising from the marriage relationship by consent, stipulation or their own conduct." (Emphasis in original.)

On the facts in this case, the principle of *Helvering* v. *Mercantile-Commerce Bank & Trust Co.* is inapplicable.

The decision of the Second Circuit Court of Appeals in the instant case goes a good deal further than the successful Government argument in *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 8 Cir. 111 F. 2d 224, cert. denied 310 U. S. 654.

In that case, the trust was created pursuant to a prenuptial agreement. The reservation by the settlor was to the effect that if, at any time, the wife should not use her income from the trust, which was fixed $417 per month, for the purpose of paying her own bills and expenses and providing for her own support, maintenance and care, and in and about the joint living expenses of the parties, then the trustees were to pay those expenses directly. That

could have been accomplished by the husband filing with the trustees an affidavit, accompanied by statements of unpaid bills. It was that feature of the trust which was particularly referred to as the basis for the conclusion in the minority opinion by the Board of Tax Appeals (*Estate of Donnelly,* 38 B. T. A. 1234), and to which the Eighth Circuit Court subsequently referred with approval, in reversing the Board's decision.

Other distinguishing features of the *Mercantile-Commerce Bank* case were that the trust was to continue during the joint lives of the parties, unless sooner terminated by divorce for the fault of the wife or for the fault of the husband, followed by remarriage of the wife. Contemporaneously with the execution of the trust, the husband and wife entered into an agreement which in effect provided that the wife would use the fixed monthly income payments when received by her to pay the expenses as contemplated by the trust. The wife also agreed that the trust provisions were in full discharge of all claims which she might ever assert against her husband for alimony, maintenance, support, or otherwise, in case of a divorce from her husband for his fault. She also released all claims for dower and statutory allowance of every kind.

It should also be noted that in the *Mercantile-Commerce Bank* case the trust was made on November 30, 1933, and the question was whether the trust was taxable under the provisions of Section 803 of the Revenue Act of 1932, which further amended Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931. As so amended in 1932, Section 302(c) provided that there be included in the gross estate of a decedent any transfers under which he had retained for his life or for any period not ascertainable without reference to his death or for any period which did not in fact end before his death, "the posession or enjoyment of, or the right to the income from, the property". This is the same language

now contained in Section 811 (c) (1) (B) of the Internal Revenue Code. The Eighth Circuit Court decided that the reservation by the settlor, of the right to have the trust income applied in discharge of his continuing legal obligations was equivalent to "retaining the right" to that income within the meaning of Section 302 (c), as amended.

However, in the instant case, the first trust was made on December 21, 1931, and by the Technical Changes Acts of 1949 and 1953, that trust is not subject to the provisions of Section 811 (c) (1) (B) of the Internal Revenue Code, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the Joint Resolution of March 3, 1931. That amendment applied only to transfers under which the transferor had retained for his life or for any period not ending before his death, "the possession or enjoyment of, *or the income from,* the property" (emphasis added).

The Court of Appeals erred in holding that extrinsic evidence received by the Tax Court was inadmissible to show decedent's motives in establishing the second trust.

All of our contentions under the preceding Points apply with equal force in the case of both trusts. However, with regard to the second and larger trust, petitioners also offered extrinsic evidence which was received by the Tax Court, for the purpose of showing that in establishing that trust the decedent had no intention of restricting his wife in any way to the use of the income therefrom for her support and maintenance.

In the first place, Mrs. Dwight testified (R. 23) that her requirements for clothing and personal expenses were provided by her 40 per cent share of the income from the first trust, which was always sufficient for those needs. She further testified (R. 24), without objection, that at or

prior to the time the second trust was established, the matter was discussed between the decedent and herself and there was an understanding that the trust was to provide her with additional money to have it for what she wanted to use it for. Mrs. Dwight indicated (R. 24-25) that her need for the money was to meet the expenses of two of her daughters who were invalids, although she said the decedent hoped the income from the second trust would be enough to take care of the expenses of the Florida home as well.

Furthermore, under date of August 5, 1935, the decedent wrote a letter addressed to his attorneys (R. 31), stating that his purpose in establishing the second trust was to provide his wife with approximately $10,000 of additional income, of which about $6000 (or 60%) was intended for annual maintenance expense of the Florida winter home that he had previously given his wife, and about $4,000 (or 40%) was intended to enable Mrs. Dwight to meet the living and hospital expenses of her two adult invalid daughters by her previous marriage. As appears by a handwritten note of decedent (R. 33) dated August 19, 1935, and for reasons explained therein, his letter of August 5, 1935, was not actually delivered until several days after execution of the trust indenture. Both of the letters were received in evidence by the Tax Court over the objection of the Commissioner.

In its opinion, the Court of Appeals did not mention Mrs. Dwight's oral testimony, although it is referred to in footnote 5 to the Tax Court's opinion (R. 16). However, the Court of Appeals held that decedent's explanatory letter of August 5, 1935, was inadmissible, on the ground that in a suit by the wife against her husband for support, the parole evidence rule would have prevented her from showing that the income from the second trust was not to be used for her support and maintenance and the existence of that trust would have been a *pro tanto* defense to the husband.

Passing over the question whether Mrs. Dwight could have sued her husband for support and maintenance, which we have discussed above, pages 9-11, the reasoning of the Court of Appeals ignores entirely the testimony of Mrs. Dwight as to the understanding with her husband as to his purpose in establishing the second trust. It also overlooks the fact that if pursuant to such an understanding, Mrs. Dwight expended the trust income for purposes other than her support, as she evidently did (R. 29-30), the decedent would have been estopped from invoking the parole evidence rule to exclude his letter in any possible suit by his wife. We submit that in such a case, the parole evidence rule would not apply between the parties, even if Mrs. Dwight could be deemed to be a party to the trust agreement on the somewhat attenuated reasoning of the Court of Appeals.

In at least the following cases, it has been held in other Circuits that the parole evidence rule does not apply where it is sought to be invoked on behalf of the Government in a tax case:

Scofield, Collector v. *Greer,* Fifth Circuit, 185 F. 2d 551;
Commissioner v. *H. F. Neighbors Co.,* Sixth Circuit, 81 F. 2d 173, 175;
Arthur R. Jones Syndicate v. *Commissioner,* Seventh Circuit, 23 F. 2d 833;
American Crystal Sugar Co. v. *Nicholas, Collector,* Tenth Circuit, 124 F. 2d 477.

In *American Crystal Sugar Co., supra,* the Court said (at p. 479):

> "The Courts of Utah, in accordance with the great weight of authority, hold that the (parole evidence) rule applies only to controversies between parties to the instrument and those claiming under them. Here, the United States was a stranger to the contract.

> It asserts a tax liability, not a claim derived from either party to the contract, and it could not invoke the parole evidence rule."

The same rule applies in New York, where it was said in the comparatively early case of *Juillard* v. *Chaffee,* 92 N. Y. 529, 534:

> "In this state it (the parole evidence rule) has been thought to be so well settled in reason, policy and authority, as not to be a proper subject of discussion. It has full application, however, within very narrow limits. In the first place it applies only in controversies between parties to the instrument (*New Berlin* v. *Norwich,* 10 Johns 229), and between them is subject to exceptions, upon allegations of fraud, mistake, surprise or part performance of the verbal agreement."

CONCLUSION

It is respectfully submitted that this case warrants review by this Court and petitioners pray that the writ be granted.

JOHN C. CRAWLEY,
Attorney for Petitioners.

DANA R. KOONS,
of Counsel.

APPENDIX A

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(c) [as amended by Sec. 207 (a) of the Technical Changes Act of 1953 (Act of August 15, 1953), P. L. 287.] *Transfers in Contemplation of, or Taking Effect at, Death.*—

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; * * *

* * *

Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the

amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516). [NOTE]

Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

NOTE: Section 207 (a) of the Technical Changes Act of 1953 (P. L. 287, Aug. 15, 1953), amending Section 811 (c) (1) (B) of the Internal Revenue Code by adding the last paragraph above set forth, is made applicable to estates of decedents dying after February 10, 1939. However, such amendment makes no material change in the language of Section 7 (b) of the Technical Changes Act of 1949 (63 Stat. 891), which was considered by the Court of Appeals in deciding this case.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and Regulations involved	2
Statement	2
Argument	7
Conclusion	15
Appendix	16

CITATIONS

CASES:

Allen v. *Ruland*, 79 Conn. 405	13
American Crystal Sugar Co. v. *Nicholas*, 124 F. 2d 477	14
Betz v. *Horr*, 276 N.Y. 83	15
Commissioner v. *Beck's Estate*, 129 F. 2d 243	12
DeBrauwere v. *DeBrauwere*, 203 N.Y. 460	14
Douglas v. *Willcuts*, 296 U.S. 1	11
Garlock v. *Garlock*, 279 N.Y. 337	11
Gray v. *Powell*, 314 U. S. 402	13
Hassett v. *Welch*, 303 U. S. 303	8
Helvering v. *Coleman-Gilbert*, 296 U. S. 369	13
Helvering v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. 2d 224, certiorari denied, 310 U. S. 654	9, 12
Higgins v. *Commissioner*, 129 F. 2d 237, certiorari denied, 317 U. S. 658	12
Higgins v. *Smith*, 308 U. S. 473	13
Hill v. *Commissioner*, 88 F. 2d 941	14, 15
Northeastern Real Estate Secur. Corp. v. *Goldstein*, 163 F. 2d 963	10
Old Colony Tr. Co. v. *Commissioner*, 279 U. S. 716	11
People ex rel. Deming v. *Williams*, 161 Misc. 573, 292 N. Y. Supp. 458	15
Pugh v. *Commissioner*, 49 F. 2d 76, certiorari denied, 284 U. S. 642	13
Scofield v. *Greer*, 185 F. 2d 551	14
Slade's Estate v. *Commissioner*, 190 F. 2d 689	14
Wanamaker v. *Weaver*, 176 N.Y. 75	10-11
Wilkening, Matter of, 137 Misc. 451, 244 N.Y. Supp. 115	11

Page

STATUTES:

Internal Revenue Code:

Sec. 22 (26 U.S.C. 1946 ed., Sec. 22) ---------- 12
Sec. 171 (26 U.S.C. 1946 ed., Sec. 171) ---------- 12
Sec. 811 (26 U.S.C. 1946 ed., Sec. 811) ----------7, 8, 16

Joint Resolution of March 3, 1931, c. 454, Stat. 1516 ------7, 18
Technical Changes Act of August 15, 1953, c. 512, 67 Stat. 615, Sec. 207 ----------7, 18
Technical Changes Act of October 25, 1949, c. 720, 63 Stat. 891, Sec. 7 ----------7, 17

MISCELLANEOUS:

Treasury Regulations 105, Sec. 81.18 ----------8, 19

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 295

ESTATE OF ARTHUR S. DWIGHT, Deceased, BARBARA CHAPIN HAMBY and JOSEPH C. BENSON, Executors, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The prevailing and dissenting opinions in the Tax Court (R. 3-18) are reported at 17 T. C. 1317. The opinions in the Court of Appeals (R. 34-41) are reported at 205 F. 2d 298.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1953. (R. 41.) The petition for

a writ of certiorari was filed on August 27, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether 40% of the corpus of the first trust and all of the corpus of the second trust here involved should be included in the grantor's gross estate for purposes of the federal estate tax under Section 811 (c)(1)(B) of the Internal Revenue Code. The answer depends upon whether the grantor retained the right to have 40% of the income of the first trust and all of the income of the second trust applied towards the support of his wife; and thus retained for his life the possession or enjoyment of, or the right to the income from, the property.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations involved are set forth in the Appendix, *infra,* pp. 16-21.

STATEMENT

The facts found by the Tax Court (R. 4-10, 19-21, 29-30) may be summarized as follows:

The decedent, Arthur S. Dwight, died on April 1, 1946, a resident of New York. (R. 4.)

On March 15, 1930, the decedent married Anne Howard Chapin. At that time she had six children by a former marriage. All were then adults except one who was 17 years of age, having been born in 1913. From the time of their marriage until the

date of decedent's death, decedent and his wife lived together as husband and wife. Their principal home was at Great Neck, Long Island, although they spent their winters in Florida. (R. 4.)

On December 21, 1931, the decedent transferred the sum of $170,000 to a corporate trustee for the benefit of his wife and six stepchildren. The trust instrument reads in part as follows (R. 5-7):

> FIRST: During the lives of the Grantor and his wife, Anne Howard Chapin Dwight, to hold, manage, and invest the said Trust Fund, to collect the rents, issues, income and profits thereof, and after deduction of the commissions of the Trustee thereon, the Federal and State Income Taxes, if any, and lawful and proper expenses of administration, to pay over and distribute the net income in equal quarterly instalments (the first payment to be within four months from the date of this instrument) to and among the Beneficiaries for their support and maintenance, without power of anticipation, in the following proportions, that is to say:
>
> Forty percentum thereof to the said ANNE HOWARD CHAPIN DWIGHT;
>
> Ten percentum thereof to each of the children of said Anne Howard Chapin Dwight, namely, RUTH CHAPIN, BARBARA CHAPIN HAMBY, HELEN SPRING CHAPIN, CONSTANCE CHRISTY CHAPIN, THOMAS CHRISTY CHAPIN and ANNE HOWARD CHAPIN. Such payments of income to the persons named shall be made on their respective sole receipts (in-

cluding the said Anne Howard Chapin, notwithstanding that she is under the age of twenty-one years), and the Trustee shall not be responsible for the use or application of such income.

SECOND: On the death of any beneficiary during the lives of the Grantor and said Anne Howard Chapin Dwight leaving issue him or her surviving, such issue shall be substituted for its parent so dying as a beneficiary or beneficiaries, and the share of income to which such parent would have been entitled if living shall be paid to such issue or to the surviving parent or guardian, if any, of such issue for the use of such issue if under the age of twenty-one years, in equal shares *per stirpes* until the death of the survivor of the Grantor and said Anne Howard Chapin Wright. If the beneficiary so dying leave no issue him or her surviving, or if such issue die before the death of the survivor of the Grantor and said Anne Howard Chapin Dwight, then the income to which such beneficiary or issue would have been entitled if living shall be added to the shares of income of surviving beneficiaries in the proportions which their respective original shares bear to the aggregate of the shares of all surviving beneficiaries.

THIRD: On the death of the survivor of the Grantor and said Anne Howard Chapin Dwight, the trust hereinbefore created shall terminate and the principal thereof, with any undistributed income shall vest in, and be transferred and paid over in equal shares to

> such of the children above-named of my wife as are then living and the issue of any deceased child *per stirpes,* such issue to take the share which its parent would have taken if living, to their own use and benefit free of any trust.

In 1934, decedent added $25,000 in cash to the principal of this trust. (R. 8.)

On August 15, 1935, the decedent established a second trust. He transferred securities aggregating about $200,000 in principal amount to the same corporate trustee. (R. 8-9, 35.) This trust provided in part as follows (R. 9):

> FIRST: During the life of Anne H. C. Dwight, the wife of the Grantor, to hold, manage, invest and reinvest the said Trust Fund, collect and receive the rents, interest, income and profits thereof, and after deducting all proper charges and expenses, to pay the net income thereof to said Anne H. C. Dwight in monthly installments, for her support and maintenance, without power of anticipation.
>
> SECOND: Upon the death of said Anne H. C. Dwight, the trust hereinbefore created shall terminate and the principal thereof, with any undistributed income shall vest in, and be transferred and paid over in equal shares to such of the following named eight persons as are then living and the issue then living of any of said persons who shall have died, *per stirpes* and not *per capita,* * * *.

At all times during their marriage, the decedent paid all the expenses of running the Long Island

home, and after the first trust was established the wife paid for her own clothing and other personal needs. (R. 10.)

The establishment of the second trust was prompted by the decedent's desire that his wife should have sufficient income to meet both maintenance expenses of the Florida home, which he had presented to her as a gift in 1934, and the substantial medical expenses of caring for her two invalid daughters by her prior marriage. (R. 10.)

One of the stepchildren died in 1945, and thereafter the income of the first trust was distributed in the proportions of 44.45% to Mrs. Dwight and 11.11% to each of her five surviving children. (R. 19-20.)

The Commissioner included the value of the entire corpora of the two trusts in the gross estate for purposes of the federal estate tax. (R. 3-4.) The Tax Court overruled such action of the Commissioner, four judges dissenting. (R. 17-18.)

The Commissioner appealed to the Court of Appeals for the Second Circuit, but limited his contention with respect to the first trust to 40% of its corpus. (R. 36.) Accordingly the Commissioner contended in the Court of Appeals that 40% of the corpus of the first trust and all of the corpus of the second trust should be included in the grantor's gross estate. The Court of Appeals sustained that contention and reversed the decision of the Tax Court, one judge dissenting in part. (R. 40.)

ARGUMENT

1. Section 811 (c)(1)(B) of the Internal Revenue Code (Appendix, *infra*, pp. 16-17) provides for the inclusion in the gross estate of property donatively transferred where the decedent retained for his life or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death, the possession or enjoyment of, or the right to the income from, the property.

Under both Section 7 of the Technical Changes Act of 1949 (Act of October 25, 1949) (Appendix, *infra*, p. 17) and Section 207 of the Technical Changes Act of 1953, approved August 15, 1953 (Appendix, *infra*, p. 18), this provision is applicable with respect to estates of decedents dying after February 10, 1939, and it applies to transfers made after March 3, 1931; but it is not applicable to a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the Joint Resolution of March 3, 1931 (Appendix, *infra*, pp. 18-19).

In the instant case the decedent died in 1946 and the first trust was established on December 21, 1931, and added to by the decedent in 1934; the second trust was established on August 15, 1935. Hence the initial transfer was made after March 3, 1931, and prior to June 7, 1932, and the

rest of the property was transferred after June, 1932.

It follows that the language of the Joint Resolution is controlling with respect to the initial transfer and the language of Section 811 (c)(1)(B) is controlling as to the rest of the transfers. Both courts below were aware of this, and they both recognized that the slight difference in the language of the Joint Resolution and Section 811 (c)(1)(B) is of no importance to this case. (R. 13, 37.) And see *Hassett* v. *Welch*, 303 U. S. 303, 307. Both Section 811 (c)(1)(B) and the Joint Resolution cover cases where the grantor retained for his life or any period not ending before his death the possession or enjoyment of, or the income from, the property; and as demonstrated below and in the opinion of the Court of Appeals (R. 34-40), we have such a situation here.

Treasury Regulations 105, Section 81.18 (Appendix, *infra*, pp. 19-21) provides in part as follows:

> The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied toward the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.
>
> If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a cor-

responding proportion of the value of the property should be included in determining the value of the gross estate.

In the instant case, the trust properties in question should be included in the grantor's gross estate under the law and the Regulations if he retained the right to have the income used to discharge his legal obligation to support his wife; and hence reserved the possession or enjoyment of, or the right to the income from, the property. *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. 2d 224 (C. A. 8th), certiorari denied, 310 U. S. 654.

Both the Court of Appeals and the dissenting judges in the Tax Court concluded that he did; and in this connection refer to the dissenting opinion of Judge Raum in the Tax Court, which concisely states the case for the Commissioner as follows (R. 17-18):

> In *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. 2d 224, the Court of Appeals for the Eighth Circuit reversed the decision of this Court in *Estate of Paul F. Donnelly*, 38 B. T. A. 1234. I think that the decision of the Court of Appeals is correct, and that it cannot fairly be distinguished from the present case, at least to the extent that the income from the trusts herein was dedicated to the support and maintenance of the decedent's wife. It is said that the trust provisions in the *Mercantile-Commerce Bank* case gave

> the settlor an "enforceable right" to have the income applied for the support and maintenance of his wife, whereas no such right existed here. But the trust instruments herein definitely called for the payment of income to the wife for her maintenance and support, and it is not accurate to suggest that these provisions were merely hortatory. Surely, if she squandered that income and then sued the grantor for maintenance and support, the existence of these trusts would be a good defense. By establishing the trusts, the decedent effectively discharged his obligation to maintain and support his wife, to the full extent that income therefrom was paid over to her. Thus, by providing for the application of income to the discharge of that legal obligation, he to that extent in fact retained, within the meaning of section 811 (c), "the possession or enjoyment of, or the right to the income from" the property which he transferred in trust.

It is plain from the trust instruments that the decedent retained the right to have the trust income here involved applied toward the satisfaction of his legal obligation to support his wife; and if she had squandered the money and then tried to force him to pay for necessaries she should have purchased with it, he would have had a good defense. *Northeastern Real Estate Secur. Corp.* v. *Goldstein,* 163 F. 2d 963 (C. A. 2d); *Wanamaker* v. *Weaver,* 176 N. Y. 75, 82, 68 N. E. 135. The Court of Appeals recognized this and held (R.

38-39) that since the income in question was to be used to discharge the decedent's legal obligation, he retained its enjoyment and use, and hence the corpus is includible under Section 811 (c)(1)(B). The taxpayers say (Pet. 9-10) that the decedent retained no control over the application of the trust income; but we submit that the wife was not at liberty to disregard the basic purpose for which it was paid to her and the Court of Appeals correctly so held. (R. 38).

We see nothing to the contrary in cases such as *Matter of Wilkening,* 137 Misc. 451, 244 N. Y. Supp. 115, cited by taxpayers. (Pet. 10.) We do not have here an arrangement such as was held to be illegal in *Garlock* v. *Garlock,* 279 N. Y. 337, 18 N. E. 2d 521, cited by taxpayers (Pet. (10); and the instant trusts were designed not to circumvent or place limitations upon the husband's legal obligations to support the wife but rather to serve as an effective instrumentality through which to discharge them. The trust income that was paid to the wife was taxable to the decedent during his lifetime. *Douglas* v. *Willcuts,* 296 U. S. 1; *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716. The amendments to the Code relating to payments of alimony (see Secs. 22(k) and 171 of the Internal Revenue Code, as added by Sec. 120 of the Revenue Act of 1942, c. 619, 56 Stat. 798) are not applicable to the facts at bar. Here there was no divorce or legal separation and the decedent and his wife lived amicably together until he died.

We recognize of course that there was no Congressional intention completely to integrate the income and estate tax laws (*Commissioner* v. *Beck's Estate,* 129 F. 2d 243, 246 (C. A. 2d); *Higgins* v. *Commissioner,* 129 F. 2d 237, 240 (C. A. 1st), certiorari denied, 317 U. S. 658); but in the circumstances of this case where estate tax liability depends upon the reservation of income rights, it seems to be at least of some significance that the trust income properly should have been taxed to the grantor during his lifetime.

In situations such as that here under review, the trust is merely a channel for application of the settlor's income to the discharge of his obligations, and the situation is essentially the same as if the settlor received the income personally and made the payments to his wife directly. And since the decedent was taxable on the income during his lifetime, it would seem clearly to follow that he retained "the possession or enjoyment of, or the right to the income" from the property within the meaning of the law and the Regulations.

The taxpayers undertake (Pet. 11-13) to distinguish *Helvering* v. *Mercantile-Commerce Bank & Trust Co., supra;* but we submit that while there are some differences in the facts, the underlying principle is controlling here and the court below correctly so held (R. 37).

2. The taxpayers also say (Pet. 13-16) that the Court of Appeals erred in holding that extrinsic evidence was inadmissible to show decedent's mo-

tives in establishing the second trust. We submit that the Court of Appeals made no error. The trust instrument plainly and unambiguously provides for the payment of the income to the wife for her support. The parol evidence rule operates to prevent the introduction of evidence which would contradict the terms of a written instrument in a case of this kind. *Pugh* v. *Commissioner,* 49 F. 2d 76, 79 (C. A. 5th), certiorari denied, 284 U. S. 642. In *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369, this Court said (p. 374):

> The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted.

Allen v. *Ruland,* 79 Conn. 405, 65 Atl. 138, stands for the proposition that the plain legal effect of a written instrument which embodies the final agreement of the parties cannot be varied by parol evidence that they did not intend it to be so interpreted, or even expressly agreed that it should have no such effect; and this rule operates in favor of those not parties to the instrument as fully as in favor of those who executed it. Thus, in *Higgins* v. *Smith,* 308 U. S. 473, 477, this Court held that the choice of disregarding an arrangement deliberately chosen by a taxpayer for conducting his affairs lies with the Commissioner and not with the taxpayer. And see *Gray* v. *Powell,* 314 U. S. 402, 414.

Viewed in this light, the decision below seems clearly correct and while it is somewhat hard to reconcile cases such as *Scofield* v. *Greer,* 185 F. 2d 551 (C.A. 5th), and *American Crystal Sugar Co.* v. *Nicholas,* 124 F. 2d 477 (C.A. 10th), cited by taxpayers (Pet. 15), we submit that there is no direct conflict which would justify certiorari here. Moreover, we are here concerned with a trust instrument that was executed under seal in New York in 1935, and apparently under the law of New York it could not have been modified by an unsealed instrument. *Slade's Estate* v. *Commissioner,* 190 F. 2d 689, 691 (C. A. 2d).

Furthermore, even if the evidence in question were admissible, it would not change the result. The family apparently spent every winter in the Florida home (R. 26) and in the circumstances the expenses of maintaining it were not without the scope of the obligations of the decedent who was a man of large means. *DeBrauwere* v. *DeBrauwere,* 203 N. Y. 460, 464-465, 96 N. E. 722; *Hill* v. *Commissioner,* 88 F. 2d 941 (C. A. 8th). As to the medical expenses of the two invalid daughters of the wife by prior marriage, it appears that one of the daughters predeceased the decedent (R. 19) and since the situation in a case of this kind is to be appraised as of the date of death of the decedent, it could hardly be contended that any amount of the trust income was applicable to expenses of that daughter. And, in any event, even if the decedent would not be directly responsible

for supporting adult stepchildren (*People ex rel. Deming* v. *Williams,* 161 Misc. 573, 292 N. Y. Supp. 458), still the mother would certainly be responsible for supporting her own invalid daughters even though they were adults (*Betz* v. *Horr,* 276 N. Y. 83, 86, 11 N. E. 2d 548) and in the circumstances of this case it would seem that such expenses would be within the scope of the decedent's legal duty to his wife (cf. *Hill* v. *Commissioner, supra*).

CONCLUSION

The decision of the Court of Appeals is correct, and there is no direct conflict. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1953.

APPENDIX

INTERNAL REVENUE CODE:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * *

(c) [as amended by Sec. 7(a) of the Technical Changes Act of 1949 (Act of October 25, 1949), c. 720, 63 Stat. 891.] *Transfers in Contemplation of, or Taking Effect at, Death.*—

* * * *

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall

possess or enjoy the property or the income therefrom; * * *

* * * *

(26 U. S. C. 1946 ed., Sec. 811.)

Technical Changes Act of 1949 (Act of October 25, 1949), c. 720, 63 Stat. 891:

SEC. 7. TRANSFERS TAKING EFFECT AT DEATH.

* * * *

(b)[1] The amendment made by subsection (a) shall be applicable with respect to estates of decedents dying after February 10, 1939. The provisions of section 811 (c) of the Internal Revenue Code, as amended by subsection (a), shall (except as otherwise specifically provided in such section or in the following sentence) apply to transfers made on, before, or after February 26, 1926. The provisions of section 811 (c)(1)(B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—

(1) a transfer made prior to March 4, 1931; or

(2) a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

* * * *

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[1] Subsection (b) was amended to some extent by Sections 608, 609 of the Revenue Act of 1951, c. 521, 65 Stat. 452, but nothing turns on those amendments here.

Technical Changes Act of 1953, c. 512, 67 Stat. 615:

SEC. 207. EXCLUSION OF CERTAIN TRANSFERS TAKING EFFECT AT DEATH.

(a) *Decedents Dying after February 10, 1939.*—Paragraph (1) of section 811 (c) (relating to the inclusion of certain interests in the decedent's gross estate) is hereby amended by inserting after subparagraph (C) the following:

"Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516)."

* * * *

(d) *Effective Date.*—The amendment made by subsection (a) shall apply only with respect to estates of decedents dying after February 10, 1939. * * *

Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.18 [as amended by T. D. 5834, 1951-1 Cum. Bull. 72, 81][2] *Transfers with Possession or Enjoyment Retained.*—(a) *General rule.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, section 811 (c)(1)(B) requires the inclusion in the gross estate of the value of all property transferred by the decedent, whether in trust or otherwise, if the decedent retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property (1) for his life; or (2) for any period not ascertainable without

[2] This regulation was further amended by T. D. 5936, 1952—2 Cum. Bull. 224, but such amendment is immaterial here.

reference to his death; or (3) for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period. Except as provided in paragraph (b) of this section, such property is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and the decedent's death was to be received by him or his estate. This expression also includes a reservation of the right to receive the income from transferred property after the death of another person who in fact survived the decedent; but in such a case the amount to be included in the gross estate under this section does not include the value of the outstanding income interest in such other person. However, if such other person predeceased the decedent, the reservation may be considered to be for the decedent's life or for such a period as to evidence his intention that it should extend at least for the duration of his life.

The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied toward the dis-

charge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See section 81.15.)

(b) *Estates of decedents dying before January 1, 1950.*—In the case of a decedent who died before January 1, 1950, property shall not be included in the gross estate under this section unless transferred—

(1) after March 3, 1931, and before June 7, 1932, and the retention or reservation by the decedent was (A) for his life or (B) for such a period as to evidence his intention that it should extend at least for the duration of his life, and his death occurs before the expiration of such period; or

(2) on or after June 7, 1932.

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